

## APPEAL NO. 93043

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On December 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant, claimant herein, was entitled to continued temporary income benefits (TIBS) at the rate of \$267.67 per week, based on an average weekly wage (AWW) of \$382.38, but that no interest was due on benefits that had been paid voluntarily. Claimant asserts that certain per diem, leave and compensatory time should be added to determine his AWW and therefore increase the amount of TIBS he is due, plus certain interest. Respondent, attorney general herein, states that claimant did not timely appeal, that "wages" may include remuneration but not reimbursement, that Commission rule 128.1(b) (Tex W. C. Comm'n, 28 TEX ADMIN CODE § 128.1(b)) includes within "wages" amounts paid for leave, not an amount calculated to represent the value of time earned during a period, and that no interest is due since no order compelled that TIBS be resumed after no payments were made from September 22, 1991 to November 4, 1991.

## DECISION

Finding that the appeal in this matter was not timely made, the decision of the hearing officer is the final administrative decision in this case. See Article 8308-6.34(h) of the 1989 Act.

Claimant was working for the (employer) on (date of injury) when he slipped in a muddy creek area hurting his back. At the time of the benefit review conference on October 6, 1992, he had been paid 77 weeks of TIBS at \$267.67 per week. According to the Statement of Evidence in the hearing officer's opinion, claimant's TIBS were suspended on September 22, 1991 based on a doctor's report that maximum medical improvement (MMI) had been reached. Thereafter on November 4, 1991, TIBS were resumed when claimant's treating doctor reported that surgery was warranted. TIBS still continued at the time of the contested case hearing on December 2, 1992. The hearing officer calculated AWW based on the claimant's wages for 13 weeks next preceding the accident plus the state's payment of health insurance of \$137.99 per month; he did not include leave and compensatory time earned in the 13 weeks or per diem expenses reimbursed in determining the amount of TIBS.

The decision of the hearing officer was distributed, by mail, on December 22, 1992. Claimant does not say when he received it, so the provisions of rule 102.5(h) apply and deem that he received it no later than five days after mailing, or December 27, 1992. He then had 15 days to file his appeal with the Commission. See Article 8308-6.41(a) of the 1989 Act. His statutory time for filing an appeal ended on January 11, 1993. His appeal was received by facsimile by the Commission in Austin (see rule 143.3(a) which requires filing at the central office in Austin) on January 15, 1993 with claimant's certification that he had served a copy of the appeal on January 15, 1993. As a result, the appeal was filed beyond the statutory 15 days allowed. Article 8308-6.34(h) of the 1989 Act states, "(t)he

decision of the hearing officer regarding benefits is final in the absence of a timely appeal by a party . . .", and controls whether review by the Appeals Panel is authorized.

The decision of the hearing officer is final since no timely appeal was made.

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Joe Sebesta  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge